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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 221

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF OHIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on October 9, 1965.

OPINIONS BELOW

Both the original opinion of the court of appeals and its opinion on rehearing (App. A, *infra*, pp. 9–25) are reported at 354 F. 2d 549.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1965, and a timely petition for rehearing was denied on January 21, 1966 (App. B, *infra*, pp. 26–27). On April 20, 1966, Mr. Justice Stewart extended the time for filing a petition for a writ of

certiorari to and including June 20, 1966. We invoke the jurisdiction of this Court under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the civil penalty imposed by the Agricultural Adjustment Act of 1938 for producing wheat in excess of a farm's wheat acreage allotment is applicable to wheat that is produced by, and entirely consumed on, State-owned institutional farms.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Agricultural Adjustment Act of 1938, as amended, and of Section 728.751 of the Regulations of the Secretary of Agriculture, are printed in App. C, *infra*, pp. 28–31.

STATEMENT

The Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended, 7 U.S.C. 1281, *et seq.*, is designed to avert the depression of wheat (and certain other commodity) prices through overproduction. To this end, farm acreage allotments are established each year (7 U.S.C. 1334 (1952 ed., Supp. V)), and penalties for production from acreage planted in excess of these allotments are imposed (7 U.S.C. 1340(2) (1952 ed., Supp. V)) when marketing quotas are in effect pursuant to 7 U.S.C. 1335(a) (1952 ed., Supp. V) and 7 U.S.C. 1336 (1952 ed.). Producers subject to these provisions include "any agency of a State" (7 U.S.C. 1301(a)(8)).

The State of Ohio maintains wheat-producing farms at a number of its penal and mental hygene institutions. Wheat is grown at at least twenty of

the mental hygiene institutions, where more than 17,000 acres of land are under cultivation, and at nine penal institutions, where an additional 9,000 acres of land are under cultivation (App. A, *infra*, pp. 11–12). The growing of wheat on these State farms is a means of occupational training, and a part of the State's program for individual therapy and rehabilitation (App. A, *infra*, p. 12).

Between 1954 and 1957 the State planted wheat at these farms in excess of the farm acreage allotments prescribed for them under the Agricultural Adjustment Act. The United States assessed penalties and, after the State refused to pay, instituted this suit in a federal district court seeking a declaratory judgment as to the State's liability under the Act, as well as a money judgment for the penalties. On motion of the United States, the district court granted summary judgment in its favor for $27,605.40. The court of appeals reversed and dismissed the action, holding that wheat production on State-owned farms, being intended entirely for home consumption, had insufficient impact on interstate commerce to justify a conclusion that Congress intended the Act to apply.[1]

REASONS FOR GRANTING THE WRIT

The court of appeals below has held that, because wheat grown by institutions of the State of Ohio is

[1] The United States also contended in the courts below that the State's defense to the action for penalties failed because it did not present that contention to a local review committee. See 7 U.S.C. 1363. It is unnecessary to press that issue here because we believe that in any event the United States is entitled to judgment under the terms of the statute.

not—and by law may not be—sold in interstate commerce, it is not subject to the acreage quotas of the Agricultural Adjustment Act. This result is directly contrary to *Wickard* v. *Filburn*, 317 U.S. 111, and *United States* v. *Haley*, 358 U.S. 644, which held that wheat produced exclusively for home or on-the-farm consumption has sufficient impact upon the market for wheat moving in interstate commerce to come within the purview of the Act.

The Court in *Filburn* did not, as the court below thought, predicate this holding solely on the theory that should the market price of wheat rise, the home-grown wheat would be attracted into the market and so depress the price—an effect arguably precluded here because the Ohio Constitution forbids the marketing of State-produced wheat.[2] The Court emphasized that, even if the home-grown wheat is never marketed, it still affects the price of wheat sold in commerce, for it supplies a need that must otherwise be satisfied by purchases in the open market.[3] In

[2] It should be noted, however, that this suit involves excess wheat grown on State-owned farms at State mental hygiene institutions as well as State prisons, and the State constitutional prohibition against sales applies only to the sale of wheat produced on State prison farms. Moreover, even as to prison production the constitutional prohibition is a limited one, apparently inapplicable where the goods involved are properly identified as "prison-made" (App. A, *infra*, p. 10).

[3] The Court in *Filburn* stated (317 U.S. at 128–129; emphasis added):

> It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such

short, without acreage control a farm producer (in this case the State of Ohio) is free to grow for his own consumption wheat that he would otherwise be compelled to purchase, and this—if sufficiently widespread—will affect the market for wheat moving in commerce.

The Act suggests no basis for distinguishing between State agencies and other farm producers (State agencies are expressly subject to the Act, see Statement, *supra*, p. 2). The one distinction suggested by the court—that Ohio's prison farms are by law debarred from marketing their wheat production—is, as we have seen, irrelevant (as well as based upon a questionable premise, see n. 2, p. 4, *supra*). There is no reason to believe that application of the acreage allotment provisions of the Federal Act will impair the rehabilitative or therapeutic purposes of such farming.[4] And, finally, there can be no doubt that the

---

wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. *But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market.* * * * This record leaves us in no doubt that *Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.*

[4] The State is, of course, free without penalty to produce wheat to the extent of its acreage allotments, and there is no indication that those allotments are unduly limited. In addition, soils adapted for the production of wheat are also capable of satisfactory yields of other crops not subject to acreage allotments, such as oats, hay and corn—crops that, in fact, the

production by State institutions for home consumption of crops subject to the Federal Act is, in the aggregate, substantial.[5]

Thus the decision below is not only patently opposed to decisions of this Court; it will, if allowed to stand, have a substantial impact upon the administration of a major federal program. Review by this Court is therefore clearly warranted.

State does grow on its institutional farms. See *Annual Report, Ohio Department of Mental Hygiene and Correction*, June 30, 1955, p. 91; *Financial and Statistical Report, Ohio Department of Mental Hygiene and Correction*, June 30, 1956, p. 44; *Financial and Statistical Report, Ohio Department of Mental Hygiene and Correction*, June 30, 1957, p. 44; *Financial and Statistical Report, Ohio Department of Mental Hygiene and Correction*, June 30, 1958, p. 44; *Financial and Statistical Report, Ohio Department of Mental Hygiene and Correction*, June 30, 1959, p. 44; *Annual Financial and Statistical Report, Ohio Department of Mental Hygiene and Correction*, June 30, 1960, p. 34; *Annual Report, 1963–64, Ohio Department of Mental Hygiene and Correction*, p. 19; *Annual Report, 1964–65. Ohio Department of Mental Hygiene and Correction*, p. 9. From the standpoint of therapy, occupational training, or rehabilitation, it would appear to make no difference whether, say, corn or wheat were grown.

[5] In App. D, *infra*, p. 32, we set forth in tabular form the results of a recent survey by the Department of Agriculture showing the production of marketing quota crops on State-owned farms. This table makes plain the magnitude of the problem involved in this case. It will be noted that wheat is not one of the crops listed in the table. This is because wheat quotas have been suspended by Congress until 1970, at which time the allotment provisions of the Agricultural Adjustment Act will again be applicable to wheat. P.L. 89–321, 79 Stat. 1199. Of course, the principle of this case is equally applicable to the other quota crops grown on State-owned institutional farms, including those of the State of Ohio.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1966.

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APPENDIX A

United States Court of Appeals for the Sixth Circuit

No. 16143

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STATE OF OHIO, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Decided October 9, 1965.

Before: CECIL * and PHILLIPS, Circuit Judges, and MATHES, Senior District Judge.**

PHILLIPS, Circuit Judge. Is the State of Ohio liable to the United States for penalties under the Agricultural Adjustment Act of 1938 for growing wheat on state-owned farms in excess of federally-imposed acreage allotments, where none of the wheat so produced entered or could have entered interstate or foreign commerce, directly or indirectly, by virtue of an express prohibition of the State Constitution?

The United States filed a complaint by authority of 7 U.S.C. § 1376, seeking a declaratory judgment as to the liability of the State under the Act, and a money

* Honorable Lester L. Cecil became Senior Circuit Judge on August 1, 1965, and has since been sitting on the court by assignment.

** William C. Mathes, Senior District Judge of the Southern District of California, sitting by designation.

judgment for penalties for the years 1954 through 1957. Upon motion of the United States, the district court granted summary judgment in the amount of $27,605.40. The State of Ohio has appealed.

We reverse the judgment of the district court.

The State of Ohio, through its Department of Mental Hygiene and Correction, operates a number of institutional farms upon which wheat has been produced annually prior to and since 1954.

Article II, § 41 of the Constitution of Ohio,[1] requires that laws shall be passed providing for the occupation and employment of inmates of certain state institutions; and that no product of the work of such inmates shall be "sold, farmed out, contracted or given away."

Pursuant to State policy as proclaimed in its Constitution, Ohio maintains a program for the care,

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[1] "Laws shall be passed providing for the occupation and employment of prisoners sentenced to the several penal institutions and reformatories in the state; and no person in any such penal institution or reformatory while under sentence thereto, shall be required or allowed to work at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be sold, farmed out, contracted or given away; and goods made by persons under sentence to any penal institution or reformatory without the State of Ohio, and such goods made within the State of Ohio, excepting those disposed of to the state or any political sub-division thereof or to any public institution owned, managed or controlled by the state or any political sub-division thereof, shall not be sold within this state unless the same are conspicuously marked 'prison made.' Nothing herein contained shall be construed to prevent the passage of laws providing that convicts may work for, and that the products of their labor may be disposed of to, the state or any political sub-division thereof, or for or to any public institution owned or managed and controlled by the state or any political sub-division thereof." (Adopted September 3, 1912.)

treatment, custody and rehabilitation of the mentally ill and State criminal offenders in State institutions. The basic objectives of this program are stated to be:

> "1) to provide humane and scientific treatment, 2) to promote study of causes of delinquency and mental illness, 3) to provide modern education and training for rehabilitation of patients and prisoners to useful citizenship and 4) to achieve the highest degree of systematic and economic management."

The growing of wheat on State farms is one of the means of occupational training and is described as an integral part of the program for individual therapy and rehabilitation.

The affidavit of the Farms Director for the State Department of Mental Hygiene and Correction contains the following description of this program:

> "That the Department of Mental Hygiene has approximately 17,432 acres of land under cultivation at the various institutions, with at least twenty (20) institutions participating in the agricultural activity of growing wheat.
>
> "Affiant states that the institutional farms of the State of Ohio have been engaged in an extensive farm agricultural program which encompasses the growing of wheat. Affiant further states that during the past fifty years wheat production has been a very important factor in this farm program and remains so today.
>
> "All the wheat produced on our farms is grown with the idea of consumption or use by the institutional system itself and none is offered for sale.
>
> "Our program is designed to furnish the institutions with feed for livestock, flour for the bakeries, nurse corps for grass and legume seedings.
>
> "Of equal importance is the opportunity afforded both patients and inmates to derive

physical and work habit benefits from supervised farm activity. Together with preventing idleness this activity is encouraged for therapeutic reasons and in the interest of rehabilitation."

The Assistant Chief of the State Division of Correction described the program as follows:

"It has been the practice and remains so today to employ inmates in the agricultural program. This program entails the cultivation of approximately 9,000 acres of land located at nine penal institutions.

"The entire production of small grain produced under this agricultural program is used as a supplement in the animal feeding program or milled into flour in our plants and used in the institutional bakeries.

"This agricultural program is an integral part of our correctional system in that it provides employment for approximately 3,000 inmates. It supplements the necessary forage needs for the animals produced on our farms, and also supplements the institutional food service needs. In addition to the above, this program provides the Division of Correction with strong, healthy rehabilitative job assignments which have proven very successful. These job assignments prevent idleness which is one of the major problems in Correctional administration. The agricultural assignments in many cases afford an excellent opportunity to engrain good work habits. In prison operation it is sometimes more important to instill good work habits than an actual skill or trade.

"Although we presently have a Penal Industries Operation that employs 2,500 to 3,000 inmates, researeh and study for additional areas for expansion in this field have not provided us with additional programs to replace our agricultural assignments."

In its complaint the United States charged that acreage allotments for 1954 were established by the County Agricultural Stabilization and Conservation Committees for the State farms in question; that written notices of these allotments were given to the superintendents of the farms; that on each of the farms the planted and harvested wheat acreage for 1954 was in excess of the farm's wheat acreage allotment; that the State of Ohio thereby became liable for penalties on the "farm marketing excess," which is "the entire wheat production of the farm minus the production of the acreage allotments;" that under the Act, 7 U.S.C. § 1340(2), and the 1954 regulations (§ 728.475 as amended, 19 F.R. 2763), the rate of penalty applicable to the marketing excess of wheat is $1.12 per bushel; that similar production in excess of allotments occurred at various state farms for the years 1955, 1956 and 1957; and that the State was liable for cash penalties as prescribed by the statute.

The United States does not challenge the State's interpretation of its Constitution. It is not disputed that all of the wheat produced on the State farms was used and consumed by State institutions. It also is unquestioned that no part of the wheat so produced, the livestock to which it was fed, or the bakery products in which it was used, was marketed or sold or moved in interstate or foreign commerce.

The State's contention is that the production of wheat on State-owned farms located at its various mental and penal institutions is for the exclusive consumption and use in such institutions; that the wheat so produced could not possibly be held available for marketing; and that under the particular facts and circumstances of this case, such wheat is not under the acreage quota provisions of the Agricultural Adjustment Act of 1938.

In planting wheat on State farms according to their own determination of institutional requirements for the years in question, and in excess of federal acreage allotments, state officials followed and relied upon an opinion rendered by the Attorney General of Ohio under date of September 25, 1941, holding that the Agricultural Adjustment Act of 1938 does not regulate the amount of wheat produced on a county-owned farm not marketed in interstate or foreign commerce.[2]

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[2] Opinion No. 4233, Opinions of the Attorney General of Ohio for 1941, pp. 778–91. This opinion was addressed to the Prosecuting Attorney of Lorain County and involved the following facts:

"Lorain County is the owner of a farm used in connection with the Lorain County Home. Among other things, wheat is grown on the said farm which wheat is used by Lorain County for feeding chickens and animals on the farm, and principally for flour for the support and maintenance of the inmates of the County Home, all of whom are charges of Lorain County.

"In connection with the conduct of the Lorain County farm 34.2 acres of wheat were planted last year. After the wheat was planted the Lorain County AAA Committee, acting under orders from the United States Department of Agriculture, fixed the wheat acreage allotment for the Lorain County Home farm at 25 acres. Said committee in behalf of the Agricultural Adjustment Administration of the United States Department of Agriculture now informs the Board of County Commissioners of this county that by reason of the excess planting Lorain County is subject to a penalty of 49¢ per bushel on 223.6 bushels (the marketing excess) and that a marketing card will be withheld from Lorain County unless Lorain County pays the sum of $109.56 to the Secretary of Agriculture of the United States as a penalty or gives a bond in that amount conditioned that 225 bushels of wheat, the property of Lorain County, will be locked up and not used."

The 1938 act, as demonstrated by the legislative findings set forth in 7 U.S.C. § 1331, was directed toward wheat moving in interstate commerce and wheat which exerts a substantial economic effect on interstate commerce. Committee reports further demonstrate this Congressional intent.[3]

The Supreme Court summarized the purpose of the Act in *Wickard* v. *Filburn*, 317 U.S. 111, 115, as follows:

> "The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce."

The statute as originally enacted contained the following definitions:

> Sec. 301(a)(3) "The term 'interstate and foreign commerce' means sale, marketing, trade, and traffic between any State or Terri-

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[3] See e.g., H.R. Rep. No. 1645, 75th Cong., 2nd Sess. at 29 (1937) which contains this language:

> "It thus appears that, for the most part, wheat moves in interstate commerce from farms to markets, from markets to mills, and in the form of flour to bakeries and to the ultimate consumers, most of whom are in the industrial and urban centers east of the large producing areas.
>
> "Bran middlings and other by products of the flour-milling industry which are used for livestock feed further add to the volume of interstate commerce, as these feed products must be shipped from milling centers to livestock-feeding areas, many of which are not within the State in which the mills are located. The most important outlets for such mill feeds are in the eastern part of the United States in the deficit feed areas, which are likewise deficit wheat-producing areas."

tory or the District of Columbia or Puerto Rico, and any place outside thereof; or between points within the same State or Territory or within the District of Columbia or Puerto Rico, through any place outside thereof; or within any Territory or within the District of Columbia or Puerto Rico."

Sec. 301(a)(4) "The term 'affect interstate and foreign commerce' means, among other things, in such commerce, or to burden or obstruct such commerce or the free and orderly flow thereof; or to create or tend to create a surplus of any agricultural commodity which burdens or obstructs such commerce or the free and orderly flow thereof." 52 Stat. 38. These definitions are codified without material change at 7 U.S.C. § 1301(a) (3) and (4).

It is clear that the term "affect interstate or foreign commerce" was used in its broadest sense.

In an attempt to achieve price stability, Congress imposed a limitation on the volume of production by establishing a system of acreage allotments so as to prevent the supply from exceeding the demand. Annual farm acreage allotments are authorized. 7 U.S.C. § 1334. The production from acreage planted in excess of these allotments is known as "farm marketing excess." 7 U.S.C. § 1340(1). Producers are penalized for any "farm marketing excess," 7 U.S.C. § 1340(2), unless it is stored or delivered to the Secretary of Agriculture in accordance with regulations. 7 U.S.C. § 1340(3). Wheat produced on excess acreage is designated as "available for marketing" and the penalty is imposed thereon. The term "market" includes disposing of the wheat by feeding it to livestock "available" for marketing. Market quotas "not only embrace all that may be sold without penalty but also what may be consumed on the premises." *Wickard* v. *Filburn, supra,* at 119.

We think there is no doubt that Congress intended for the Act to apply to all wheat producers, including state-owned farms, when the wheat can be said to be "exerting a substantial economic effect on interstate commerce." *Wickard* v. *Filburn, supra,* at 125. Among the general definitions contained in the statute as originally enacted was the following: "The term 'person' means an individual, partnership, firm, joint-stock company, corporation, association, trust, estate, or any agency of a State." 52 Stat. 39. This definition is presently codified at 7 U.S.C. § 1301(a)(8).

The Government strongly contends that *Wickard* v. *Filburn, supra,* requires affirmance of the judgment of the district court. *Wickard* held that the act applies to wheat grown by a farmer for his own use, even though not intended to be sold or marketed, since this wheat, or the livestock to which it is fed, is "available" for marketing. Home grown wheat was described as "the most variable factor in the disappearance of the wheat crop." *Wickard* v. *Filburn, supra,* at 127.

The Court summarized the facts in *Wickard* as follows:

> "'The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here involved has not been expressly stated." 317 U.S. at 114.

Applying a basic maxim for the interpretation of judicial opinions, we read the general expressions of the Court in *Wickard* "in connection with the case in which those expressions were used." *Cohens* v. *Virginia,* 19 U.S. (6 Wheat) 264, 398.

It is an elementary rule of construction that a statute will be interpreted in light of the purposes it seeks to achieve and the evils it seeks to remedy. *Fasulo* v. *United States,* 272 U.S. 620, 629; *Holy Trinity Church* v. *United States,* 143 U.S. 457, 463. Statutes must be given effect in accordance with the purpose manifested by Congress. *Commissioner* v. *Bilder,* 369 U.S. 499.

The care, treatment, custody and rehabilitation of its mentally ill and offenders against state criminal laws are obligations of the State of Ohio. We find no language in the statute and nothing in the legislative history indicating an intent on the part of Congress to extend the wheat quota system in such a way as to interfere with these functions and obligations of a state, particularly when as in the present case there is a provision of the State Constitution under which the wheat could not be "available" for marketing and did not and could not move in interstate or foreign commerce.

We find *Wickard* v. *Filburn* to be distinguishable on its facts from the present case. Although that case involved only one small farm in Ohio, this farm was typical of hundreds of thousands of small farms throughout the nation. In the aggregate home grown wheat produced on such farms exerts a very considerable economic effect on interstate commerce. Speaking of the Filburn farm, the Supreme Court said: "[H]is contribution, taken with that of many others similarly situated, is far from trival." 317 U.S. at 128. Even if such a farmer used and consumed for

his own family purposes all the wheat grown on his farm and sold no part of it, nevertheless it was "available for marketing." With respect to the Filburn farm and all other farms similarly operated, it is impossible to determine conclusively whether the wheat so grown will or will not be channeled into interstate commerce.

Therefore, the penalties prescribed by the Act "do not depend upon whether any part of the wheat, either within or without the quota, is sold or intended to be sold." 317 U.S. at 119. Accordingly the Supreme Court held the volume and variability of home-consumed wheat has a substantial influence on price and market conditions. This may arise because "* * * *being in a marketable condition* such wheat *overhangs the market.* * * *" [Emphasis added.] 317 U.S. 128.

In the present case it cannot be said that any of the wheat produced on the state-owned farms was in a "marketable condition" at any time or that wheat grown under such circumstances "overhangs the market."

It is argued that the wheat grown by the State of Ohio displaced wheat which the State otherwise might have purchased on the market, and in this sense affected interstate commerce. Such a contention is conjectural, in that it undoubtedly would involve the amounts of money appropriated by the Ohio legislature for such purposes as well as other factors. It is unrealistic to say that this factor, standing alone, would exert any substantial effect on interstate commerce under the facts and circumstances of this case. We are unwilling to construe the statute as applicable under these circumstances in the absence of a clearly-expressed congressional intent.

On the issue of congressional intent, the Government relies upon the action of Congress in 1957 in enacting Public Law 85–203, 71 Stat. 477.[4]

Since the 1957 amendment was made applicable only to wheat harvested in 1958 and subsequent years, and did not apply to the years 1954 through 1957 here involved, it is argued the Congress has expressed an intent to make the statutory penalties applicable to state-grown wheat for the years here in question.

We have examined the committee reports concerning the 1957 amendment and find no such intention expressed or indicated. By its terms the exemption of state-owned farms appears to relate to nothing more than to the acreage exemption of thirty acres.[5]

We therefore conclude that the provisions of the Agricultural Adjustment Act of 1938 are not applicable to wheat produced by a state-owned farm under the facts and circumstances of this case.

Reversed and dismissed.

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[4] This Act amended Section 335 of the original Act by adding the following:

"(f) The Secretary, upon application made pursuant to regulations prescribed by him, shall exempt producers from any obligation under this Act to pay the penalty on, deliver to the Secretary, or store the farm marketing excess with respect to any farm for any crop of wheat harvested in 1958 or any subsequent year on the following conditions:

"(1) That the total wheat acreage on the farm does not exceed 30 acres: *Provided, however*, That this condition shall not apply to farms operated by and as part of State or county institutions or religious or eleemosynary institutions;"

[5] This exemption was removed by Public Law 87–703, 76 Stat. 621. Sec. 7 U.S.C.A. § 1335.

United States Court of Appeals for the Sixth Circuit

No. 16143

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STATE OF OHIO, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Petition to Rehear Denied January 21, 1966

Before PHILLIPS, Circuit Judge, CECIL, Senior Circuit Judge, and MATHES, Senior District Judge.*

PHILLIPS, Circuit Judge. The United States has filed a petition for rehearing, raising two questions which were not discussed in the original briefs:

> (1) That the district court and this court have no jurisdiction to entertain the defense of the State of Ohio against the penalties sought to be enforced in this case because the State did not exhaust administrative remedies to challenge the validity of acreage allotments.
>
> (2) That a disputed question of fact exists as to whether the wheat harvested on state-owned farms has a substantial effect on interstate commerce, under the facts of this case, and that the case therefore should be remanded for the taking of proof on this issue.

* William C. Mathes, Senior United States District Judge for the Southern District of California, sitting by designation.

I

It is insisted that, as a prerequisite to asserting its defenses in this case, it was necessary for the State to have challenged the acreage allotments by seeking a review by a local review committee of three farmers as provided by 7 U.S.C. § 1363.[1] Failure of the State to seek such a review, it is said, operated to strip the district court and this court of jurisdiction to pass upon the validity of such allotments.[2]

This court has held that a farmer must exhaust his statutory administrative remedies before he can challenge the accuracy of wheat acreage allotments as a defense to an action by the United States to collect civil penalties for overproduction. *Corbin* v. *United States*, 279 F. 2d 431 (C.A. 6); *Donaldson* v. *United*

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[1] § 1363. Review of quota; review committee

"Any farmer who is dissatisfied with his farm marketing quota may, within fifteen days after mailing to him of notice as provided in section 1362 of this title, have such quota reviewed by a local review committee composed of three farmers from the same or nearby counties appointed by the Secretary. Such committee shall not include any member of the local committee which determined the farm acreage allotment, the normal yield, or the farm marketing quota for such farm. Unless application for review is made within such period, the original determination of the farm marketing quota shall be final."

[2] The United States also relies upon U.S.C. § 1367, which provides as follows:

"§ 1367. Stay of proceedings and exclusive jurisdiction

"The commencement of judicial proceedings under this part shall not, unless specifically ordered by the court, operate as a stay of the review committee's determination. Notwithstanding any other provision of law, the jurisdiction conferred by this part to review the legal validity of a determination made by a review committee pursuant to this part shall be exclusive. No court of the United States or of any State shall have jurisdiction to pass upon the legal validity of any such determination except in a proceeding under this part."

States, 264 F. 2d 804 (C.A. 6); *Donaldson* v. *United States*, 258 F. 2d 591 (C.A. 6); *Miller* v. *United States*, 242 F. 2d 392 (C.A. 6), cert. denied, 355 U.S. 833. Without lengthening this opinion by a detailed discussion of each case, we find all these decisions to be distinguishable on their facts from the present case.

For the reasons set forth in our original opinion, we hold that these statutes do not apply to the State of Ohio under the facts and circumstances of this case. The issue here is not the *amount* of the acreage allotments, but whether the State of Ohio is subject to the provisions of the Act under the facts here presented. Relying upon an opinion of the State Attorney-General rendered September 25, 1941 (See footnote 2, original opinion), the State of Ohio has taken the consistent position that the Agricultural Adjustment Act of 1938 does not regulate the amount of wheat produced on state-owned farms for use and consumption in State institutions, which under no circumstances could be marketed directly or indirectly in interstate or foreign commerce under the express prohibition of the State constitution. The present suit, filed by the United States, challenges the validity of this defense.

The institutional farms operated by the State of Ohio are located in different parts of the State. It would be an extremely cumbersome procedure, and quite obviously a useless one, to call upon three farmers in the same or nearby counties to pass upon the question of whether Congress intended for the statute to apply to state-owned farms in such a situation. The purpose of the administrative procedure prescribed by the statute is to ascertain the correct number of acres in an allotment, and not to require committees of farmers to make adjudications on issues of congressional intent.

This contention raised by the petition for rehearing would extend the doctrine of exhaustion of administrative remedies beyond the limits of practicality and common sense, and, we believe, beyond the Congressional purpose in enacting §§ 1363 and 1365 (footnotes 1 and 2).

We hold that the State was not required to resort to the statutory administrative procedure for testing marketing quotas as a prerequisite to interposing its defense under the facts of this case.

II

In the district court the United States filed a motion for summary judgment, upon the ground that "there is no genuine issue as to any material fact." The district court entered summary judgment on this motion. For the first time the United States now takes a position, on petition to rehear, that there is a genuine issue of material fact as to whether the wheat produced on state-owned farms and consumed for state purposes had a substantial effect on interstate commerce.

We conclude that there is no genuine issue of material fact in this case on this issue. We have held that under the constitution of Ohio this state-produced wheat was not "available" for marketing and did not "overhang" the market, and did not and could not move legally in interstate or foreign commerce. The same is true of all by-products of the wheat. The United States does not contend that any part of the wheat or its by-products in fact was marketed in violation of the State constitution. The sole argument is that, if Ohio did not grow its own wheat, it would be required to resort to the regular commercial markets for substitute supplies, thereby affecting

interstate commerce. While there is general language supporting this argument in *Wickard* v. *Filburn,* 317 U.S. 111, a different factual situation was involved in that case. We adhere to the view expressed in our original opinion that these general expressions in *Wickard* v. *Filburn* are to be read in connection with the facts of that case and are not controlling under the facts of the present case; and that the amount of wheat that Ohio otherwise might have purchased necessarily would be conjectural.

The petition for rehearing is denied.

APPENDIX B

United States Court of Appeals for the Sixth Circuit

No. 16143

Filed October 9, 1965, Carl W. Reuss, Clerk

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STATE OF OHIO, DEFENDANT-APPELLANT

Before: PHILLIPS, Circuit Judge, CECIL, Senior Circuit Judge, and MATHES, Senior District Judge.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio
and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the case dismissed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

(S) CARL W. REUSS, *Clerk.*

United States Court of Appeals for the Sixth District

No. 16143

Filed January 21, 1966, Carl W. Reuss, Clerk

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

STATE OF OHIO, DEFENDANT-APPELLANT

ORDER

Before: PHILLIPS, Circuit Judge, CECIL, Senior Circuit Judge and MATHES, Senior District Judge.

In accordance with the opinion this day filed, the petition for rehearing is denied.

Entered by order of the Court.

(S) CARL W. REUSS, *Clerk.*

APPENDIX C

Statutes and Regulations Involved

The Agricultural Adjustment Act of 1938, as amended, provides in pertinent part:

7 U.S.C. 1340 (1952 ed., Supp. V):

Supplemental provisions relating to wheat marketing quotas; marketing penalty for rice; crop loans on cotton, wheat, rice, tobacco, and peanuts.

Notwithstanding the other provisions of this chapter—

* * * * * *

(2) During any marketing year for which quotas are in effect, the producer shall be subject to a penalty on the farm marketing excess of wheat. The rate of the penalty on wheat shall be 45 per centum of the parity price per bushel of wheat as of May 1 of the calendar year in which the crop is harvested.

(3) The farm marketing excess for wheat shall be regarded as available for marketing * * *. The Secretary shall issue regulations under which the farm marketing excess of the commodity for the farm may be stored or delivered to him. Upon failure to store or deliver to the Secretary the farm marketing excess within such time as may be determined under regulations prescribed by the Secretary, the penalty computed as aforesaid shall be paid by the producer. * * *

7 U.S.C. 1363:

Any farmer who is dissatisfied with his farm marketing quota may, within fifteen days after

mailing to him of notice as provided in section 1362 of this title, have such quota reviewed by a local review committee composed of three farmers from the same or nearby counties appointed by the Secretary. Such committee shall not include any member of the local committee which determined the farm acreage allotment, the normal yield, or the farm marketing quota for such farm. Unless application for review is made within such period, the original determination of the farm marketing quota shall be final.

7 U.S.C. 1365:

If the farmer is dissatisfied with the determination of the review committee, he may, within fifteen days after a notice of such determination is mailed to him by registered mail or by certified mail, file a bill in equity against the review committee as defendant in the United States district court, or institute proceedings for review in any court of record of the State having general jurisdiction, sitting in the county or the district in which his farm is located, for the purpose of obtaining a review of such determination. * * *

7 U.S.C. 1366:

The review by the court shall be limited to questions of law, and the findings of fact by the review committee, if supported by evidence, shall be conclusive. If application is made to the court for leave to adduce additional evidence, and it is shown to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the review committee, the court may direct such additional evidence to be taken before the review committee in such manner and upon such terms and conditions as to the court may seem proper. The review committee may modify its findings of fact or its determination by reason of the additional evidence so

taken, and it shall file with the court such modified findings or determination, which findings of fact shall be conclusive. At the earliest convenient time, the court, in term time or vacation, shall hear and determine the case upon the original record of the hearing before the review committee, and upon such record as supplemented if supplemented, by further hearing before the review committee pursuant to direction of the court. The court shall affirm the review committee's determination, or modified determination, if the court determines that the same is in accordance with law. If the court determines that such determination or modified determination is not in accordance with law, the court shall remand the proceeding to the review committee with direction either to make such determination as the court shall determine to be in accordance with law or to take such further proceedings as, in the court's opinion, the law requires.

7 U.S.C. 1367:

* * * Notwithstanding any other provision of law, the jurisdiction conferred by this part to review the legal validity of a determination made by a review committee pursuant to this part shall be exclusive. No court of the United States or of any State shall have jurisdiction to pass upon the legal validity of any such determination except in a proceeding under this part.

Section 728.751 of the Regulations of the Secretary of Agriculture, 22 F.R. 1357 (1957), provides in pertinent part:[1]

[1] The Regulations of the Secretary of Agriculture for the years 1954 through 1956 have provisions identical to those quoted above for 1957. 1956 Regulations, § 728.651(f) and (l), 20 F.R. 9476 (1955); 1955 Regulations, § 728.551(f) and (l), 20 F.R. 1623 (1955); 1954 Regulations, § 728.451(f) and (l), 19 F.R. 203 (1954).

(f) "Person" means an individual partnership, association, corporation, estate, trust, or other business enterprise or legal entity, and wherever applicable, a State, political subdivision of a State, the Federal Government, or any agency thereof.

* * * * *

(l) "Producer" or "farmer" means a person who as owner, landlord, tenant, or sharecropper is entitled to all or a share of the 1957 wheat crop or of the proceeds thereof.

APPENDIX D

Production of marketing quota crops by State institutional farms, 1965 crop year[1]

RICE

State	Acreage	Production	Market channels	Used by institution
Mississippi	211.0	6,330 cwt.	None	3,165 cwt.[2]
Texas	292.2	10,281 cwt.	7,251 cwt.	3,030 cwt.
Arkansas	2,175.5	237,884 bu.	234,884 bu.	3,000 bu.

PEANUTS

Arkansas	80.0	4,000 bu.	None	4,000 bu.
Alabama	69.0	Unknown	None	All
Mississippi	45.0	37,900 lbs.	None	37,900 lbs.
North Carolina	349.4	609,990 lbs.	609,990 lbs.	None
Oklahoma	1.0	5,750 lbs.	5,750 lbs.	None
Texas	340.6	392,000 lbs.	None	392,000 lbs.
South Carolina	53.8	14,353 lbs.	9,503	4,850
Virginia	35.0	87,500 lbs.	None	87,500 lbs.
Georgia	42.1	84,962	80,962	None

COTTON

Alabama	1,300	1,409 bales	629 bales	780 bales
Arizona		41,000 bales	None	41,000 bales
Louisiana	634	286,000 lbs.	286,000 lbs.	None
Mississippi	5,134	2,935,816 lbs.	2,935,816 lbs.	None
North Carolina	278.1	161,455 lbs.	161,455 lbs.	None
Oklahoma	406.0	130,000 lbs.	130,000 lbs.	None
Arkansas	2,169.1	1,525,396 lbs.	1,525,396 lbs.	None
Tennessee	480.0	350,000 lbs.	350,000 lbs.	None
Texas	9,458	5,527,250 lbs.	1,157,547 lbs.	4,369,703 lbs.
South Carolina	166.5	104,825 lbs.	104,825 lbs.	None
Virginia	200.0	133,200 lbs.	133,200 lbs.	None

TOBACCO

Indiana	20.0	40,000 lbs.	None	40,000 lbs.
Iowa	[3] 7.0			
Kentucky:				
Burley	.76	2,000 lbs.	None	2,000 lbs.
Fire-cured	.91	1,800 lbs.	None	1,800 lbs.
Tennessee	6.5	8,450 lbs.	8,450 lbs.	None
Georgia	9.0	944 lbs.	944 lbs.	None
South Carolina	6.03	11,647 lbs.	11,647 lbs.	None

[1] Source: Agricultural Conservation and Stabilization Administration, Department of Agriculture.
[2] 3,165 cwt. traded to other institutions within and out of the State.
[3] Estimated for 1966.

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IN THE

Supreme Court of the United States

No. 271

OCTOBER TERM, 1966.

UNITED STATES OF AMERICA,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF OF RESPONDENT, STATE OF OHIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT.

This Brief is filed in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit of the United States of America, whereby the United States petitions this Court to review the decision of the United States Court of Appeals *United States of America* v. *State of Ohio*, decided October 9, 1965, 354 F. 2d 549. It shall be the purpose of this Brief to demonstrate that the decision rendered by the United States Court of Appeals below in this matter is not in conflict with any prior decisions of this Court. As a consequence the Petition is without merit, raises no basis upon which to invoke this Court's jurisdiction, and should be dismissed.

ARGUMENT.

The Petition for Writ of Certiorari (hereinafter called "the Petition") should be dismissed because the decision of the United States Court of Appeals for the Sixth Circuit is not in conflict with prior decisions of this Court, nor will it if allowed to stand have a substantial impact upon the administration of the Agricultural Adjustment Act of 1938, 52 Stat. 31, as amended, 7 U.S.C. 1281, et seq.

It must be made very clear at the outset that the State of Ohio is not contending that the operation of State of Ohio owned farms per se as a function of state government is immune from the regulatory powers and control of the Agricultural Adjustment Act of 1938. The contention is that the so-called wheat marketing excess which was penalized was not production of wheat within the intended, implied or permitted scope of the Agricultural Adjustment Act of 1938.

Petitioner in the courts below has relied heavily upon the case of *Wickard* v. *Filburn*, 317 U.S. 111, as being dispositive of this case. Respondent contends that the holding of the Court of Appeals below is in no way in conflict with *Wickard* v. *Filburn*, *supra*. The facts present in the case at bar are readily distinguishable from the factual situation present in the *Wickard* case, *supra*.

The Supreme Court of the United States summarized the facts in *Wickard* as follows:

> "The appellee for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to

use some in making flour for home consumption; and to keep the rest for the following seeding. The intended disposition of the crop here has not been expressly stated." 317 U.S. at 114.

Article II, Section 41 of the Constitution of Ohio requires that laws shall be passed providing for the occupation and employment of inmates of certain state institutions; and that no product of the work of such inmates shall be "sold, farmed out, contracted, or given away." Pursuant to the above Constitutional provision, Ohio maintains a program for the care, treatment, custody, and rehabilitation of the mentally ill and State criminal offenders in State institutions. The growing of wheat on State farms is an integral part of the program for individual therapy and rehabilitation. All of the wheat produced on the State farms prior to 1954 and since then has been used and consumed by State institutions. Also, no part of the wheat produced, the livestock to which it was fed, or the bakery products in which it was used, was marketed or sold or moved in interstate or foreign commerce.

The Agricultural Adjustment Act of 1938 was enacted by Congress as a means to eliminate abnormal surplus or deficiency of wheat and other commodities on the country-wide market which would directly affect interstate and foreign commerce by depressing prices and disrupting the orderly marketing of such commodities.[1] The law provides for the establishment of a "farm marketing quota" and the assessment of penalties for excessive acreage.[2] The terms "interstate and foreign commerce"[3] and "market"[4] as defined in this Act clearly indicate that the act is concerned

[1] 7 U. S. C. 1331.
[2] 7 U. S. C. 1335 (a) and 1340 (1).
[3] 7 U. S. C. 1301 (a) (3).
[4] 7 U. S. C. 1301 (b) (6) (A).

with the disposal or intended disposal of a named commodity by sale, barter or exchange directly or indirectly to points within or without the state. "Affect interstate and foreign commerce"[5] means to burden or obstruct the free and orderly flow of such commodity or to create or tend to create a surplus which burdens the flow of the commodity in interstate commerce.

In applying this law to the operation of the State of Ohio farms, the Petitioner, as pointed out above, relies heavily on the *Wickard* case, *supra*. In the *Wickard* case, *supra*, the government contended that the acreage quota applied to all wheat whether marketed or retained for home consumption. The argument presented was that the beneficial purpose of the statute could be best achieved if the quota system applied to all wheat available for marketing and not merely that which was actually sold, because of the relationship of all available wheat to market price.[6] The court applied this thinking and ruled as follows:

> "One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat could have a substantial influence on price and market condition. This may arise because being in a marketable condition such wheat overhangs the market and if induced by rising prices tends to flow into the market and check price increases. But if we assume that it is never marketed, it supplies a need of the man who grew it in the open market. Home grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon." 317 U.S. at 128.

[5] 7 U. S. C. 1301 (a) (4).
[6] 317 U. S. 118.

It is clear that the basis for regulation in this case was the competitive interdependency which exists between local production and interstate commerce.[7] In the *Wickard* case, *supra*, all wheat produced was considered available for marketing and as an "overhang" of the market such wheat in the aggregate could possibly affect the price and flow of wheat in commerce. Unlike the individual farmer the State of Ohio on no occasion markets wheat and therefore the wheat produced on farms does not "overhang" the market. It is clear that one cannot conclusively determine whether wheat grown on an individual's farm will or will not be channeled into interstate commerce. It is, however, clearly ascertainable that the state, in the operation of its farms in 1954 through 1957, not only did not intend to market any wheat but had no authority to hold wheat available for disposal otherwise than in the operation of its state institutions.[8] In this case then, there exists no possibility of marketing wheat and the finding of impossibility must take the production of wheat by the state out from under the application of the *Wickard* case, *supra*.

The case at bar is further distinguished from *Wickard*, *supra*, in that the Petitioner failed to provide any factual finding of a substantial economic effect upon interstate commerce while the Court in *Wickard*, *supra*, pointed out the need of a "substantial economic effect." Specifically the Court said,

[7] This followed the holdings of *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, and Shreveport Rate Cases, 234 U.S. 342.

[8] Section 41, Article II, Ohio Constitution prohibits the sale or disposal of the products from prison labor, and the theory behind such a prohibition would be equally applicable to disposal of any goods produced in state institutions except to the state and its political subdivisions and its various public institutions.

> "That an activity is of local character may help in a doubtful case to determine whether Congress intended to reach it. The same consideration might help in determining whether in the absence of congressional action it would be permissible for the state to exert its power on the subject matter, even though in so doing it to some degree affected interstate commerce. But even if appellee's activity be local and though it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" 317 U.S. at 124-5.

As can readily be seen the holding in the Court of Appeals below is distinguishable from the *Wickard* case, *supra*, and *United States* v. *Haley*, 358 U.S. 644, which is a memorandum opinion following *Wickard*, *supra*. Petitioner has not asserted a conflict with any other decisions of this Court and Respondent has not found any that are in conflict.

For all of the foregoing reasons, it is respectfully submitted that the Petition presents no basis upon which to invoke this Court's jurisdiction on certiorari and should be dismissed.

Respectfully submitted,

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